

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

TRC.No. 270 of 2002

ORDER DATED 17.5.2002 IN TA.221/1999 OF KERALA SALES
TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, KOZHIKODE
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REVISION PETITIONER/RESPONDENT

M/S. SHENOY'S RED ROSE, FORT ROAD,
KANNUR

BY ADV. SRI.N.MURALEEDHARAN NAIR
SRI.V.K.SHAMUSUDHEEN

RESPONDENT/APPELLANT

STATE OF KERALA.

BY GOVERNMENT PLEADER MR.MATHEW GEORGE

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD
ON 27/06/2007 ALONG WITH TRC NO. 271 OF 2002 & TRC NO.272
OF 2002 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

T.R.C.Nos.270, 271 & 272 of 2002

Dated, this the 27th day of June, 2007

ORDER

H.L.Dattu, C.J.

Since common questions of law and facts are involved in all these Tax Revision Cases, they are clubbed together, heard and disposed of by this common order.

(2) Assessee is a dealer registered under the provisions of the Kerala General Sales Tax Act, 1963 (Act for short). He is doing business in cooked food and beverages like Falooda, juices, cool drinks, ice cake etc.

(3) For the assessment years 1993-94, 1994-95 and 1995-96, the assessee had filed his annual returns. The assessing authority keeping in view Section 5B of the Act and item 12 of the third Schedule to the Act has granted limited exemption on the sales turnover of the assessee. Aggrieved by this action of the assessing authority, the assessee had carried the matter before the first appellate authority. The appellate authority has accepted the stand of the assessee and accordingly has allowed the appeal except with regard to the turnover of ice cake. Accordingly the appellate authority has directed the assessing authority to quantify the tax liability of the petitioner afresh.

(4) Aggrieved by the orders so passed by the first appellate authority, the revenue had carried the matter by way of second appeal before the Tribunal in Appeal Nos.221, 222 and 223 of 1999. The Tribunal by its common order dated 17th May, 2002 has set aside the orders passed by the first appellate authority and has restored the orders passed by the assessing authority. That is how the assessee is before us in these Tax Revision Cases

filed under Section 41 of the Act.

(5) The assessee has framed the following questions of law for our consideration and decision. They are as under:

“(1) Whether the Appellate Tribunal is correct in law in finding that regular assessment under section 5 is to be followed if the turnover is below the minimum prescribed under section 5B of the K.G.S.T.Act?

(2) Whether on the facts and circumstances of the case the Appellate Tribunal was correct in law in holding that the petitioner is liable to pay tax on the turnover of juice and cool drinks as unclassified item since section 5B is not applicable to the petitioner?

(3) Whether on the facts and circumstances of the case additions sustained by the appellate Tribunal is correct and reasonable?

(4) Whether on the facts and circumstances of the case the Appellate Tribunal erred in law in not granting opportunity for hearing to the petitioner?”

(6) At the time of hearing of these revision petitions Mr.V.K.Shamsudheen, learned counsel appearing for the assessee, would submit that the assessing authority and the Tribunal were not justified in granting exemption to the petitioner only in respect of items that would fall under Item 12 of the third Schedule to the Act. According to the learned counsel, since the petitioner's annual turnover for all these three years is less than rupees five lakhs, the petitioner cannot be mulcted with any tax liability under Section 5(1) of the Act. In aid of his submission the learned counsel has taken us through the orders passed by the first appellate authority and the provisions of Section 5B of the Act.

(7) Section 5 of the Act is the charging provision which provides for the creation of tax liability. It deals with the classification of dealers, points of levy,

total turnover, deductions, taxable turnover and exemption including taxable limit. Section 5B of the Act authorises payment of licence fee in lieu of tax under Section 5 and Section 5A of the Act.

(8) To appreciate the contentions canvassed by the learned counsel for the assessee, the provisions of Section 5B of the Act and Item 12 of the third Schedule to the Act requires to be noticed. They are as under:

“5B. Levy of license fee on cooked food:- Any dealer in cooked food, including beverages sold or served not falling under the entries against serial No.46 and 60 of the first schedule whose turnover in a year exceeds five lakh rupees, shall pay annual license fee at the rate of five hundred rupees for every one lakh rupees or part thereof in excess of five lakh rupees, in such manner as may be prescribed.

Provided that such dealer shall not be liable to pay tax under sub-section (1) and (2) of Section 5 and under Section 5A.”

(9) A reading of the aforesaid statutory provision would indicate that a class of dealers registered under the Act is authorised to pay licence fee in lieu of tax. The ingredients that are required for the purpose of Section 5B of the Act are: (i) a dealer should be doing business in cooked food, including beverages sold or served which are not falling under Entries 40 and 60 of the first Schedule to the Act, and (ii) his turnover should exceed five lakh rupees. In such an eventuality he shall pay annual licence fee of Rs.500/- for every one lakh rupees or part thereof in excess of five lakh rupees in the manner prescribed. That only means that Section 5B authorises payment of licence fee, if the turnover of a dealer in cooked food including beverages exceeds five lakh rupees.

(10) The proviso appended to the said Section would amply suggest that if a dealer falls under the ambit of Section 5B of the Act, then he is not

liable to pay tax under sub-sections (1) and (2) of Section 5 and 5A of the Act.

(11) Now we turn to Item 12 of the third Schedule to the Act. The same reads as under:

“12. Cooked food including coffee, tea and like articles served in a hotel, restaurant or any other place not falling under entry 40 of the first Schedule and when the turnover does not exceed Rs.5 lakhs.”

(12) Section 9 provides for statutory exemptions. The commodities and the transactions that are eligible for exemption is enumerated under Third Schedule to the Act. Item 12 of the third Schedule speaks of cooked food including coffee, tea and like articles served in a hotel, restaurant or any other place not falling under entry 40 of the first Schedule, if the turnover does not exceed five lakh rupees.

(13) Keeping in view the possible construction that may be placed on Section 5B of the Act and Entry 12 of the third Schedule to the Act, let us see the facts situation. Admittedly, the petitioner is a dealer in cooked food and beverages like Falooda, juices, cool drinks, ice cake, coffee, tea, etc. What is exempted under Entry 12 of the third Schedule to the Act is only cooked food, coffee and tea if it is served in a hotel or restaurant provided its turnover is less than five lakh rupees. Keeping in view the entry under the Third Schedule to the Act, the assessing authority has granted exemption to the assessee on the sales turnover of the cooked food including coffee, tea and like articles, but has directed the assessee to pay tax under Section 5(1) of the Act on the sale of beverages like juices, cool drinks, ice cake, etc.

(14) Section 5B of the Act, as we have already stated, authorises a dealer to pay licence fee in lieu of basic tax, if his turnover exceeds five lakh

rupees. Again, in the said Section it is made clear that levy of licence fee could only be if the sales turnover of the dealer exceeds five lakh rupees.

(15) Since the sales turnover of the dealer in the present case of cooked food, including coffee, tea, etc, is less than rupees five lakh, the assessee cannot take recourse to the provisions of Section 5B of the Act on those items which do not come under item 12 of Third Schedule to the Act. Keeping that in view the assessing authority as well as the Tribunal have directed the assessee to pay tax under Section 5(1) of the Act. This, in our opinion, is justified in view of what we have stated in the earlier paragraphs of our order.

(16) Accordingly, we are unable to accept the stand of the learned counsel for the assessee. Therefore, these revision petitions require to be rejected and they are rejected by confirming the orders passed by the Tribunal.

Consequently C.M.P.Nos.4576, 4578 and 4580 of 2002 are also dismissed.

Ordered accordingly.

(H.L.DATTU)
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

vns/DK